LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR 21 1950

IN THE

Supreme Court of the United States

October Term, 1949

No. 513

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

against

BANQUE MELLIE IRAN,

Respondent.

MOTION OF RESPONDENT BANQUE MELLIE IRAN TO DISMISS WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ALLEN T. KLOTS,
Attorney for Respondent Banque Mellie Iran.
40 Wall Street,
New York 5, N. Y.

MERRELL E. CLARK,
Of Counsel.

INDEX

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Other Authorities

IN THE

Supreme Court of the United States

October Term, 1949

No. 513

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

against

BANQUE MELLIE IRAN,

Respondent.

MOTION OF RESPONDENT BANQUE MELLIE IRAN TO DISMISS WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

COMES NOW, Banque Mellie Iran, the respondent in the above entitled cause, and by its counsel of record moves that the writ of certiorari heretofore granted herein on February 20, 1950 to the Court of Appeals of the State of New York to review a judgment of that Court dated April 13, 1949, be dismissed on the ground that there is no Federal question now presented on this review and that this Court is without jurisdiction herein because the Federal question presented by the petition has been rendered moot and of no substance by reason of a license granted by the

Department of Justice, Office of Alien Property, dated March 16, 1950, a copy of which is hereto annexed as Exhibit A, and because no case or controversy now exists between the real parties in interest.

(Signed) ALLEN T. KLOTS,
Attorney for Respondent
Banque Mellie Iran,
40 Wall Street,
New York 5, N. Y.

MERRELL E. CLARK,
Of Counsel.

EXHIBIT A

In reply, please refer
to file number
MSM:DGM:ekl
F-39-177

DEPARTMENT OF JUSTICE
Office of Alien Property
Washington 25, D. C.

MAR 16 1950

Winthrop, Stimson, Putnam & Roberts, Esqs.
40 Wall Street
New York 5, New York

Attention: Allen T. Klots, Esq.
Re: Application on behalf of Banque Mellie Iran for a license under the Trading with the Enemy Act, as amended.

Gentlemen:

Reference is made to the application dated May 3, 1949, for a license or authorization under the Trading with the Enemy Act, as amended, filed by your firm on behalf of Banque Mellie Iran to permit payment of the sum of $112,205.30 to your firm as attorneys for Banque Mellie Iran, pursuant to a judgment of the Court of Appeals in the action entitled *Banque Mellie Iran* v. *The Yokohama Specie Bank, Ltd., and Elliott V. Bell, etc.* Reference is made also to our letter of January 24, 1950 advising that a license for payment will not be granted unless this Office is prepared to license the underlying transactions. At a conference between Mr. Allen T. Klots of your firm and members of my staff, Mr. Klots stated that the application previously filed might be deemed amended to include an application for a license of the underlying transactions.

After due consideration of facts and arguments presented in the foregoing application, the discussion which took place at the conference with Mr. Klots, the memorandum and other documents submitted by you, together with the facts and the law as developed in the above-entitled litigation, and pursuant to authority under the Trading with the Enemy Act, as amended (50 U. S. C. App. 1-39), Executive Order No. 8389, as amended, (3 CFR, 1943 Cum. Supp.), Executive Order No. 9095, as amended, (3 CFR, 1943 Cum. Supp. and 3 CFR, 1945 Supp.), delegated to me by Executive Order No. 9788 (3 CFR, 1946 Supp.), Executive Order No. 9989, (3 CFR, 1948 Supp.), Paragraph I (b) (1) of Statement of Organization and Delegation of Final Authority, 13 F. R. 9605, and pursuant to the Rules of Office of Alien Property, Department of Justice (8 CFR 505.1):

I hereby license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran in the above-entitled action, and, accordingly, also authorize your firm, as attorneys for Banque Mellie Iran, to receive and the Superintendent of Banks to pay the sum of $112,205.30 from the assets of The Yokohama Specie Bank, Ltd. in the possession of the Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd. Authority is also granted to the Superintendent of Banks to make the necessary entries on the books of the bank to reflect the transactions and the payment authorized by this license.

Sincerely yours,

(Signed) HAROLD I. BAYNTON

Harold I. Baynton

Acting Director

Office of Alien Property

Department of Justice

cc: Edward Feldman, Esq.

IN THE

Supreme Court of the United States

October Term, 1949

No. 513

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

against

BANQUE MELLIE IRAN,

Respondent.

BRIEF OF RESPONDENT BANQUE MELLIE IRAN IN SUPPORT OF MOTION TO DISMISS THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

This is a motion under Rule 7 to dismiss the writ of certiorari heretofore granted by this Court on February 20, 1950 to the Court of Appeals of the State of New York to review a judgment of that Court dated April 15, 1949 (R. 363). This motion is made on the ground that subsequent to the granting of the writ a license was granted by the Department of Justice of the United States, Office of Alien Property, dated March 16, 1950, which resulted in the

elimination of any Federal question from this case and rendered moot and of no substance the question presented by the petition. A printed copy of the license issued by the Department of Justice, Office of Alien Property, is attached to this motion and a photostatic copy thereof has been filed with this motion with the Clerk of this Court.

Opinions Below.

The opinion of the Supreme Court, County of New York, is reported in 188 Misc. 346 (R. 322); that of the Court of Appeals in 299 N. Y. 139 (R. 351), motion for reargument denied 300 N. Y. 459 (R. 364). No opinion was rendered by the Appellate Division—see 274 App. Div. 768 (R. 348).

The Grounds of This Motion.

The basis of this motion is that the granting of the license referred to above has made the question presented on this appeal moot because that license authorizes and validates the very transactions which the petitioner claims were forbidden by Executive Order No. 8389 because unlicensed, which contention was the sole basis of the petition to this Court.

It will be recalled that while the petition herein was pending, the United States of America filed a memorandum as *amicus curiae*. In that memorandum the Solicitor General stated that consideration was then being given to the issuance of a license for the payment of respondent's claim, and that it was hoped that a final decision granting or denying such license might be made in the "fairly near future" (Memorandum for the United States as *Amicus Curiae*, page 6, footnote 3). The Department of Justice has

now acted and has granted the license on which this motion is based. In this document the licensing authority states:

> "I hereby license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran in the above-entitled action, and, accordingly, also authorize your firm, as attorneys for Banque Mellie Iran, to receive and the Superintendent of Banks to pay the sum of $112,205.30 from the assets of The Yokohama Specie Bank, Ltd. in the possession of the Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd. Authority is also granted to the Superintendent of Banks to make the necessary entries on the books of the bank to reflect the transactions and the payment authorized by this license." (Exhibit A attached to the motion, p. 4, *supra.*)

It is our contention that this license removes the Federal question from this case. The Federal question which the petitioner asked this Court to review on writ of certiorari was, in the words of the petition, as follows:

> "does Presidential Executive Order No. 8389 (the Freezing Order) issued pursuant to Section 5(b) of the Trading with the Enemy Act of October 6, 1917 and the rules and regulations issued pursuant thereto prevent the accrual or creation of a claim predicated upon a transaction prohibited by such Order, and render such claim void?" (Petition, p. 2.)

As we have indicated in our brief in opposition to the petition (p. 2), we do not agree that the question presented is as defined by the petitioner. The Court of Appeals of the State of New York stated the Federal question in its amended remittitur, as follows (R. 356):

> "A federal question was presented and necessarily passed upon by this Court, viz: it was held

> that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, and that the documents in evidence do not constitute such a license."

Assuming, however, that the question presented is as defined by the petitioner or that respondent's right to a preference was in any way based on prohibited transactions, the transactions which he characterizes as "prohibited" by Executive Order No. 8389 were prohibited *only if unlicensed*. The fact that a license has now been issued by the appropriate licensing authority, authorizing and validating these very transactions, now removes all basis for his contention and eliminates the only Federal question involved in this case.

The Facts.

The nature of the review herein sought and the facts underlying this case appear in the brief of Banque Mellie Iran in opposition to the petition, at pages 3 to 6, inclusive. For the convenience of the Court we summarize them again here.

Respondent Banque Mellie Iran is the central bank of Iran. It has recovered a judgment in the Court of Appeals of the State of New York to the effect that it has a preferred claim in the amount of $112,205.30 against the assets of The Yokohama Specie Bank, Ltd. in the State of New York which are now in the hands of petitioner, the Superintendent of Banks of the State of New York, as liquidator. The judgment expressly provides that payment of this claim is "subject to the provisions of Executive Order of the President of the United States No. 8389, as amended"—*i. e.* subject to the issuance of a license (R. 9).

The validity of plaintiff's claim against The Yokohama Specie Bank, Ltd. is not disputed. The sole question involved in the litigation was whether it is entitled to a preference under the New York statute in the New York liquidation proceeding. The New York State Banking Law, Section 606-4a, provides that a claim against a foreign banking corporation in liquidation shall be preferred against the New York assets of such corporation if it be one "arising out of transactions" had by the claimant with the New York Agency of such foreign banking corporation. All the New York courts, including the Court of Appeals, have held that the claim was one arising out of a transaction with the New York Agency. The petitioner seeks to have this holding reviewed, on the ground that the transactions on which the Court of Appeals relied in holding that the claim arose out of transactions with the New York Agency of The Yokohama Specie Bank, Ltd. were prohibited by the Executive Order because unlicensed.

The transactions which the Banque Mellie Iran had with the New York Agency in connection with this claim were as follows:

In the first half of 1941 respondent Banque Mellie Iran (through its correspondent in New York, Irving Trust Company) paid numerous sums aggregating $117,162.27 to the New York Agency of The Yokohama Specie Bank, Ltd. (R. 23). These sums were all paid to the New York Agency prior to July 26, 1941, the date on which the freezing order—Executive Order No. 8389—became applicable to Japanese assets. They were paid for the purpose of supporting certain credits opened simultaneously in Japan (R. 24, 160-161). These credits were opened by cables from Teheran to the various branches of The Yokohama Specie Bank in Japan, and were to be drawn upon by shippers in Japan who had sold goods to Iranian customers (R. 161).

These credits were to expire on a date fixed, "with the proviso that the unused balances were to be returned to plaintiff", as the Court of Appeals found (R. 351; 299 N. Y. 139, 142). With the exception of $1,000, none of these credits was utilized prior to their expiration dates (R. 161).

Thereafter, subsequent to July 26, 1941, the date of the freeze, the branches of The Yokohama Specie Bank in Japan sent a series of cables to the New York branch, instructing the latter to repay respondent certain of these sums, amounting in all to $112,205.30 (R. 142-155, 42) and the New York Agency of The Yokohama Specie Bank, on or about December 2, 1941, notified Irving Trust Company, the representative of respondent Banque Mellie Iran in New York, that it had been instructed to repay these sums provided a license from the Treasury Department should be procured (R. 36-37, 25-26). No further transactions took place, and no entries were even made on the books of the New York Agency as a result of this correspondence (R. 264). Because Japanese funds had by that time become frozen, payment could not be made without a license. Before a license could be obtained, war broke out between this country and Japan and on December 8, 1941 the Superintendent of Banks of the State of New York took possession of the New York assets of The Yokohama Specie Bank pursuant to the New York statute (R. 207, 215).

After the petitioner Superintendent of Banks had taken possession of these assets, respondent Banque Mellie Iran filed a claim with him asserting that its claim was entitled to be preferred by reason of the fact that the statute gave preference to claims "arising out of transactions" with the New York Agency, and that respondent's claim arose out of such a transaction (New York State Banking Law, Section 606-4a; R. 245-249). Petitioner the Superintendent of Banks rejected the claim. Thereupon respondent instituted

this litigation in the State of New York, and, on motion for summary judgment, judgment was entered in favor of respondent to the effect that it was entitled to a preferential payment out of these assets, the payment to be subject to the provisions of Executive Order of the President of the United States No. 8389, as amended (R. 9). The Court of Appeals affirmed the judgment to that effect.

In dealing with the assets of The Yokohama Specie Bank, Ltd. in New York, the Alien Property Custodian undertook their supervision and chose to vest the excess remaining after the payment of all claims entitled to a preference under the New York law [Supervisory Order No. 27 (R. 198); Vesting Order No. 915 (R. 201, 191)]. The Alien Property Custodian permitted petitioner, however, to continue his liquidation and administration of these assets and the payment of all preferred claims subject to the Supervisory and Vesting Orders referred to above [see letter dated September 28, 1942 (R. 242-244, 237, 238)].

ARGUMENT.

POINT I.

The only question presented to this Court and the only Federal question involved, was the effect of unlicensed transactions on respondent's claim to a preference. The licensing and validating of these transactions have removed that question.

It will be seen from the above statement of facts, and from the opinion of the Court of Appeals itself, that the transactions with the New York Agency on which the Court of Appeals relied in holding that this claim was entitled to preferential status, were the original deposit of the monies

in New York with the New York Agency; the notification by the home office in Japan to the New York Agency of the amount of the unutilized credits; and the notification by the New York Agency to the Irving Trust Company that it had received instructions to pay over the funds but would hold them pending receipt of a Federal Treasury license (R. 351, 352). These transactions constituted the course of dealing which the Court of Appeals referred to as follows:

> "Underlying plaintiff's claim for that amount was a course of dealings which culminated in the advice by the Agency that it was in funds which it was obligated to pay to plaintiff" (R. 353).

It was this "course of dealings" which the Court held entitled the claim to a preference under the New York statute.

It is to be noted that the very genesis of the claim arose as the result of a transaction with the New York Agency had in New York before the freeze—namely, the deposit of these monies with the New York Agency with, in the words of the Court of Appeals, "the proviso that the unused balances were to be returned to plaintiff" (R. 351). The only transactions which occurred after the freeze which the Court of Appeals relied on, were the notification by the home office in Japan to the New York Agency to repay the unutilized amounts to respondent and the letter from the New York Agency to the Irving Trust Company saying that it had been instructed to repay these amounts provided it was authorized by the Treasury to do so. As we have contended in our brief in opposition to the petition herein, neither the Trading with the Enemy Act nor the Executive Order forbade the offices in Japan to request the New York Agency to refund these monies (see cables, R. 142-155, 42). Nor did the Executive Order forbid the New York Agency to inform the plaintiff through the Irving Trust Company that the monies would be paid "provided we are authorized by

the Treasury to do so" (R. 36, 25). If, however, there could conceivably be any taint of illegality in these two acts or in any legal consequences arising therefrom, this license which has now been issued by the Department of Justice of the United States removes it.

The document on which we base this motion not merely authorizes the payment of this claim but undertakes to "license, authorize and validate the *transactions which form the basis of the claim* of the Banque Mellie".

The specific authority for validating and authorizing a transaction after it has taken place is to be found in General Ruling of the Treasury Department No. 12, April 21, 1942, 7 F. R. 2991, subdivision (3), as follows:

> "(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder."

In a press release issued April 21, 1942, the Treasury Department explained the nature of General Ruling No. 12 and referred to this paragraph as follows:

> "Paragraph (3) of the ruling provides that a license issued by the Treasury Department, either before or after a transfer, completely validates the transfer for the purposes of freezing control. Of course, if an assignment would have been invalid without freezing control (e. g., because not properly executed), a Treasury license does not purport to remedy this type of invalidity." (Press Release No. 34, April 21, 1942. Reprinted in "Documents

Pertaining to Foreign Funds Control", U. S. Treasury Department 1946, p. 74.)

General Ruling No. 12 was issued by the Secretary of the Treasury by virtue of Executive Order No. 8389. The authority to issue this license was transferred to the Attorney General from the Secretary of the Treasury by Executive Order No. 9989, August 20, 1948, 13 F. R. 4891, which continued in force the provisions of General Ruling No. 12 above quoted, except that the licensing authority was made the Department of Justice, Office of Alien Property, instead of the Secretary of the Treasury (8 C. F. R. 505.1).

Again, General Ruling No. 4, subdivision (18), September 3, 1943, 8 F. R. 12285, recognizes the power of the licensing authority to authorize and validate prior transactions if the authorization specifically so provides. General Ruling No. 4 reads as follows:

> "(18) No license or other authorization issued by or under the direction of the Secretary of the Treasury pursuant to the Order or sections 3(a) or 5(b) of the Trading with the Enemy Act, as amended, shall be deemed to authorize or validate any transaction effected prior to the issuance thereof, *unless such license or other authorization specifically so provides.*" (Emphasis ours.)

It follows from the foregoing that no Federal question remains for this Court to review, and that the question presented is now moot and without substance, since all transactions which the Court of Appeals took into consideration in determining whether the respondent's claim was entitled to a preference have now been authorized and validated. It would serve no purpose to hold that the Court of Appeals erroneously permitted rights to accrue based upon transactions prohibited by the Executive Order, because

these transactions, if there was any doubt about them in the first place, have now been authorized and validated *nunc pro tunc* by the agency of the United States Government which has clear authority to validate them.

It is well settled that this Court will not pass on moot questions.

Muskrat v. United States, 219 U. S. 346;

California v. *San Pablo etc. Railroad*, 149 U. S. 308;

Constitution of the United States, Art. III.

POINT II.

The question sought to be reveiwed is also moot because there is now no case or controversy between the real parties in interest.

The fact is that there is no longer any real case or controversy in this Court because the real parties in interest accede to the allowance and payment of the claim. The monies here in dispute can go only either to respondent or to the Office of Alien Property.

It will be recalled that the Alien Property Custodian, in his Vesting Order of February 25, 1943 (R. 201), vested all assets of The Yokohama Specie Bank, Ltd. in New York which were in excess of the amount required to pay claims of creditors preferred under the New York statute. It is conceded that petitioner has in his possession ample assets to pay all preferred claims, including respondent's claim, in full with interest. If this claim were denied a preference under the New York statute, the monies which would otherwise go to pay it, would vest in the Office of Alien Property

Control. That office and respondent are, therefore, the only parties in interest, and that office has now issued a license authorizing the payment of the claim in full and authorizing and validating the very transactions on which the claim is based. There is no controversy between the Office of Alien Property and the respondent. Both want the claim to be paid.

Petitioner has no real interest in the controversy. If the claim is allowed as a preferred claim there are ample assets with which to pay it and no other claimant to the funds in the hands of petitioner will be deprived of one penny. If the claim were disallowed as not a preferred claim, the monies which would otherwise go to the claimant would be paid by the petitioner to the Office of Alien Property Control. Petitioner's interest is, therefore, purely that of a stakeholder, and he is in no position to present a real case or controversy.

Conclusion.

For the foregoing reasons, the writ of certiorari herein should be dismissed.

Respectfully submitted,

ALLEN T. KLOTS,
Attorney for Respondent
Banque Mellie Iran,
40 Wall Street,
New York 5, N. Y.

MERRELL E. CLARK,
Of Counsel.